IN THE HIGH COURT OF JUDICATAURE FOR RAJASTHAN AT

JODHPUR.

ORDER.

Harjiram & anr. vs. Smt. Mooli Devi & ors.

S.B.Civil Revision Petition No.1109/2003 under Section 115, C.P.C. against the order dated 25.8.2003 passed by the Addl. Civil Judge(Jr.Div.) No.4 Jodhpur.

Date of Order: September 7th ,2005.

PRESENT

HON'BLE MR. PRAKASH TATIA,J.

Mr. S.C. Maloo for the petitioners.
Mr. R.K. Thanvi and Mr. Rajesh Joshi for the non-petitioners.

REPORTABLE **BY THE COURT:**

The petitioners are aggrieved against the order dated 25.8.2003 passed by the executing court in Execution Case No.4/2003.

2. Brief facts of the case are that non-petitioner no.1-Smt. Muli Devi filed a suit for prohibitory and mandatory injunction against the defendants-appellants and respondents no.3 and 4 who are Urban Improvement Trust, Jodhpur and Municipal Corporation, Jodhpur. The case of the plaintiff as pleaded by her is that she is owner of the house situated on plot no.144 of Maderna colony, Bhadwasia, Jodhpur, which

she purchased by registered sale-deed dated 7.2.1994. The defendant nos.1 and 2 on an open land (ditch) towards the eastern side of the house of the plaintiff and which is situated towards north side adjoining to road forming a corner, encroached upon and raised a temporary construction for their residence despite having no right to do so. On 24.4.1997, the defendant nos. 1 and 2 on spot gave some instructions to the contractor, upon which the plaintiff came to know that they will raise pukka constructed house. According to the plaintiff, it will obstruct the air and light of the plaintiff's windows and ventilators and the plaintiff has since every right to use the open government land, therefore, the defendants be restrained from raising any construction and the defendants no.3 and 4 may be directed to remove the encroachment of the construction by defendants no.1 and 2.

3. In the trial court, defendants' no.1 and 2-appellants did not file written statement and the trial court closed the defendant's right to file the written statement. Defendant no.4-U.I.T. Jodhpur submitted written statement and stated that the disputed land belongs to the U.I.T., Jodhpur and the defendants no.1 and 2 have no right to occupy and raise construction over it without obtaining permission of the U.I.T., Jodhpur. Though written statement was filed by defendant no.3 but no issues were framed by the trial court by observing that nobody has raised any objection about the plaintiff's claim despite the fact that

relief was sought against defendant no. 3 also who contested the suit and filed the written statement. However, even though no issues were framed by the trial court on the ground that no body has denied claim of the plaintiff still instead of decreeing suit of the plaintiff, the trial court fixed the date for the evidence of the plaintiff. Plaintiff and her husband appeared as witness before the trial court. It appears from the finding recorded by the trial court in its judgment dated 22.11.2000 that the trial court took note of the fact that plaintiff's husband P.W.2-Vishwa Nath stated on oath that in the north side of the plaintiff's house, there is one complex (Sulabh Complex) and distance between the plaintiff's house and the house of Harji(defendant no.1) is 20 ft. P.W.2 Vishwa Nath further admitted that there is a lane in between defendant’s and plaintiff’s house. He also admitted that in this lane plaintiff's doors and windows are opening.

4. The trial court in the judgment held that every body has a right to use every inch of the public land and the defendants no.1 and 2 since who are in possession of land and raised temporary (Kacha construction), want to raise the permanent construction over the land which appears to be not belonging to the defendants-petitioners, therefore, they have no right to keep their construction and the same may be demolished. The operative portion of the judgment is as under:-

"९ वादिनी मूली देवी का वाद प्रतिवादी सं० १ व २ क्रमश: हरजीराम व छोगाराम के विरूद आज्ञप्त किया जाकर आदेश दिया जाता है कि प्रतिवादीगण वादपत्र के मद सं० २ में वर्णित विवादित भूमि पर कोई निर्माण कार्य नहीं करें और जो अतिक्रमण करके कच्चा निर्माण कार्य किया है, उसे अपने खर्चे पर हटावें। साथ ही प्रतिवादी सं० ३ व ४ को भी जरिये आज्ञापक निषेधाज्ञा द्वारा पाबन्द किया जाता है कि यदि प्रतिवादी सं० १ व २ द्वारा कोई गैर कानूनी निर्माण कार्य किया गया है तो उसे हटा दिया जावें। जयपत्र बनाया जावे ।"

5. The decree holders submitted execution petition before the executing court which was registered as Execution Case No.04/01. It appears from the record that the executing court fixed the date in execution case for 6.9.2002 but the decree holder plaintiff-non-petitioners submitted an application under Section 151, C.P.C. praying that she in execution petition, only prayed that encroachment from the public properly be removed and in execution she prayed for issuing possession warrant under Order 21 Rules 35 and 36, C.P.C. but direction may be issued to judgment-debtors nos. 3 and 4 U.I.T., Jodhpur and Municipal Corporation, Jodhpur(only) to comply with the terms of the decree. By this the construction raised by the petitioner judgment debtors could have been removed without notice to the petitioner-judgment debtors. Another reason for it might be because the plaintiff did not seek relief of mandatory injunction in the suit against the defendant nos.1 and 2-petitioners and she sought relief against the

Municipal Corporation and the U.I.T., Jodhpur that they may be directed to remove the defendant's-petitioner's encroachment. In spite of decree holder's prayer to issue direction the U.I.T. and Municipal Corporation, Jodhpur the executing court issued notice under Order 21 Rule 32, C.P.C. to all the four judgment debtors including petitioners-private judgment debtors whose construction was sought to be removed. By notice under Order 21 Rule 32 C.P.C. the judgment debtors were directed to obey the directions given in the decree for removal of construction of the defendants no.1 and 2.

6. In response to that notice under Order 21 Rule 32, C.P.C., the judgment debtors, the present petitioners submitted reply raising objection about the executability of the decree. Judgment-debtors-petitioners pleaded that the decree is inexecutable because of the reason that from the decree, the property upon which decree is to be executed is not identifiable. In the decree as well as in the judgment and even in the plaint, there is no mention of any of the measurements like length or width of the property. Nor property's neighborhood or any plot number has been given in the decree, judgment or even in the plaint. Not only above but it is not mentioned which of the property is to be removed because, according to learned counsel for the petitioner, admittedly a Sulabh Complex (Public Toilet) has been constructed by the Municipal Corporation in between plaintiff's house and defendant's

house before the suit was decreed by the trial court and this fact has been admitted by the plaintiff's husband witness before the trial court. Therefore, the decree became inexecutable. There are so many other grounds taken by the judgment debtors in their objection petition.

7. The decree holders submitted reply to the objections and submitted that the decree is not a nullity or inexecutable. In reply to the judgment-debtors allegation about the identity of the property, the decree holders after denying the allegations stated that the judgment debtors did not read the decree properly. However, the decree holder herself could not give specific reply about the allegations of the judgment debtors about not mentioning of facts to identify the property and even did not disclose the measurements of the property, its neighborhood and its any plot number to identify the property nor plaintiff could give area of the plot or particulars of the construction sought to be removed by executing the decree.

8. It will be relevant to mention here that the judgment debtors also submitted an objection petitioner under Section 47, C.P.C. stating therein that there was a lane of 20 ft. in between the house of the decree holders and Harji Ram (judgment debtor) but now the State Government has constructed the *Sulabh* Complex in this lane. In view of the above, the execution petition may be dismissed. The executing court heard the arguments on this objection petitioner under Section

47, C.P.C. and even after noticing that objection petition filed by the judgment debtors under Order 21 Rule 32, C.P.C. is pending instead of deciding the two petitions together, the executing court by brief order dismissed the objection petition of the judgment debtors filed under Order 41 Rule 27, C.P.C. by observing that the judgment debtors did not submit any written statement in the trial court and they cannot challenge the decree now in execution. The executing court also observed that the judgment debtors have challenged the judgment and decree dated 20.11.2002 by filing appeal but no stay order has been granted by the appellate court.

9. After all above, ultimately the petitioners objection petition filed under Order 21 Rule 32 C.P.C. was heard and dismissed by the executing court by order dated 25.8.2003. The executing court, after noticing the facts of the various applications and orders passed on those application, held that the executing court cannot go behind the decree and cannot judge whether there is any illegality in passing of the decree or not. However, the executing court observed that in case, the decree is not found nullity or inexecutable then the executing court can proceed with the execution. The executing court also observed that to find out the true meaning of the decree, the pleadings also can be looked into. According to the executing court, by reading para 2 of the plaint, it is clear that the decree has been passed for the construction raised over

the land mentioned in para 2 of the plaint and the property can be identified. With these reasoning, the executing court dismissed the petitioners' objection petition.

10. The learned counsel for the petitioners vehemently submitted that the decree is inexecutable in view of the fact that even if not only the decree but even pleadings of the plaintiff and evidence produced by the plaintiff are read to find out the exact property for which decree has been sought and alleged to have been passed for any specific immovable property even then the property for which the execution is sought, cannot be identified. There is no measurement of the property, no length and width is given, no neighborhood of the property is given. It is also submitted by learned counsel for the petitioners that court can take note of the admitted subsequent event of construction of the Sulabh Complex (Public Toilet) in between the house of the plaintiff and defendant by the Municipal Corporation, Jodhpur. According to learned counsel for the petitioners, this event rendered the suit and decree passed in the plaintiff’s suit infructuous because plaintiff sole cause for filling suit was that by the construction of defendant’s house, air and light of the plaintiff’s house will be adversely affected and unless, said Sulabh complex is removed no purpose will be served by removing petitioner's house which is far away from plaintiff's house and is not obstructing light and air of plaintiff's house. Learned counsel for

the petitioners even submitted that in fact the suit of plaintiff as pleaded does not disclose any cause of action against the defendants because in the plaint itself and in plaintiff's evidence it has been admitted by the plaintiff that there is a wide lane between the plaintiff's and defendant's house which is 20' wide.

11. The learned counsel appearing on behalf of the non-petitioner decree holders vehemently submitted that the objection petition filed by the judgment debtors-petitioners is misconceived and the judgment debtors wants to raise the issues which are nothing but the pre-decree matters. What is the measurement and neighbourhood of the property in dispute is concerned, that could have been made an issue by the defendants in the trial of the suit but they did not even file the written statement and controverted the facts alleged by plaintiff. Therefore, after decree of the trial court, they cannot dispute about the identity of the property. It is also submitted that it is clear from the facts pleaded in the plaint and particularly in paras no.1 and 2 that the plaintiff has given out the complete details about his house. The plaintiff also disclosed where the defendants raised the construction and it is admitted case of the U.I.T., Jodhpur that the property belongs to them, therefore, such an illegal construction cannot continued after the decree. The learned counsel for the non-petitioner decree holders also further vehemently submitted that the objection petition filed by the

judgment debtors is not maintainable as their application under Section 47, C.P.C. has already been dismissed by the trial court. It is also submitted that the courts should lien in favour of the validity of the decree and the plaintiff decree holders cannot be denied the fruits of the decree in a case where the other party has been given full opportunity to contest the suit and he failed to context the suit. It is also submitted that the petitioner's want raise grounds which were not raised by the petitioners in their objection petition before the court below or even have not raised the grounds in memo of revision petition.

12. I considered the submissions of the learned counsel for the parties and perused the record.

13. The executing court cannot travel beyond the decree nor go behind the decree, is a settled law. Therefore, the executing courts have to take the decree as it stands. If the executing court finds some vagueness in the decree then the judgment can be looked into and in case still the ambiguity remains, pleadings can be looked in to, to find out the true and correct meaning of the decree which will advance the cause of justice. Decree passed by the court of law has its own sanctity. Technicalities of law cannot come in the way of the executability of the decree passed by the court of law within its jurisdiction. The issues which have been raised in the trial of the suit and even which could have been raised but not raised cannot be raised in execution

proceedings. Normally identity of the property involved in the litigation is a pre-decree matter. The defendant gets full opportunity to raise all his objections against court's passing a decree against him which includes objection about the identity of the property in dispute. Most common objection against execution of the decrees for immovable properties is about identity of the property involved in the suits. It happens because of the reason while drafting the case in plaint no due care is given and requirement of Order 7 Rule 3,C.P.C. are ignored not only while drafting the plaint but by the courts while proceedings with the suits and while passing the decrees in the suits. Another reason is that suits are filed without noticing the difference between the facts which are foundation for establishing the right of the plaintiff and the facts about the property for which the plaintiff is seeking relief. For example, In a suit for easementory right, situation of the plaintiff's property gives plaintiff a right to the plaintiff to claim relief but subject matter in such suit is the other's property as the decree can be passed only with respect to that property which infringes plaintiff's right. The plaintiffs normally take care to describe their own property in suit but in such cases may fail in describing the other's property against which the plaintiff has grievance. The courts also in such facts passes the decree to remove the obstruction but without specifying the area and extent of the property to be removed leaving it for the decree holder and

judgment debtor to fight it out in execution of the decree resulting into grave injustice to the parties. Decree holder's greed compels him to take maximum benefit of the situation in his favour after decree. The plaintiff- decree holder, who did not give full description of the 'disputed' property (distance of the "disputed" from plaintiff's property and the length & width of the disputed property which shall be needed to be removed for the beneficial enjoyment of the plaintiff's property and other relevant facts) initiates the execution proceedings by submitting that the obstruction may be removed with help of court's order and with the help of the court commissioner and if needed, with the help of police. The executing court, without application of mind issues the order to the judgment debtor or to the court officer to remove the obstruction. Nobody knows by removing obstruction of what length & breadth the decree will be satisfied. According to plaintiff-decree-holder, removal of defendant-judgment debtor's entire house only can satisfy the decree irrespective of its length and width. In such case, the defendant-judgment debtor comes to senses when it is too late. The decree holder becomes guardian of court's order with humble and innocent face and starts saying "this is question of sanctity of court's decree", court's decree cannot be rendered waste paper etc. .

14. Present case is worse than the case of above situation. It will be worthwhile to quote all the relevant Paras form the plaint which are,

paras no. 2 to 7 and relief claimed in the suit:-

"**Paras no.2 to 7of the plaint**:-

(2)यह है कि वादीनी के मकान की पूर्वी दिशा में जो खलसा जमीन (खडडा) आई हुई है उस तरफ वादिनी के मकान के पूर्वी हिस्सें जो दक्षिणि तरफ सडक जो चिपता हुआ है तथा कोना बना हुआ है । उस खालसा भूमि पर प्रतिवादी सं० १ (एक) व २ (दो) ने नाजायज रूप से कब्जा कर कच्चा निर्माण कर अपना रहवास बना लिया है जबकि उनकों ऐसा करने का कोई कानूनी अधिकार नहीं है । इस सम्बन्ध में वादिनी की तरफ से शिकायतें भी की गई लेकिन प्रतिवादी सं० १ (एक) व २ (दो) राजनैतिक प्रभाव रखते है इसलिए उन्होनें कोई कार्यवाही नहीं होने दी ।

(3)यह है कि दिनांक 28.4.97 (अठाईस चार सिन्तानवें) को सवेरे करिब 8.00 (आठ) बजे प्रतिवादी सं० १ (एक) व २ (दो) कि व्यक्ति को हाथ से इशारा करते हुए कुछ समझा रहे थे तब वादिनी के पति ने प्रतिवादी सं० १ (एक) व दो से पूछा कि क्या कर रहे हो तब प्रतिवादी सं० २(दो) ने जवाब दिया कि ये ठेकेदार है तथा यहाँ अब पक्का निर्माण कार्य कर मकान बनाया जायेगा । वादीनी के पति ने तब प्रतिवादी सं० २ (दो) से कहा कि ये तो खालसा भूमि है आप ने इस पर नाजायज कब्जा कर रखा है न तो आपके पास इसका पप्टा है और न आपने निर्माण की कोई स्वीकति ही ली है । इस पर प्रतिवादी सं० १ (एक) ने हल्की हंसी एवं व्यग्य के साथ कहा कि पटटा तो बनावालेंगे पहले मकान तो बना ले । हम लोगो को निर्माण की स्वीकति की आवश्यकता नहीं जसवन्त भाई हमारे साथ है । हम तो रातो रात सारा निर्माण करवा देंगे ।

(4)यह है कि प्रथम तो प्रतिवादी सं० १ (एक) व २ (दो) का खालसा भूमि पर नाजायज कब्जा है, द्वितीय प्रतिवादी सं० १ (एक) व २

(दो) ने निर्माण की आवश्यक स्वीकति प्राप्त नही की है, ततीय प्रतिवादी सं० १ (एक) व 2 (दो) द्वारा इस प्रकार गैर कानूनी निर्माण से वादीनी के मकान में पूर्वी तरफ बनी खिडकिया एवं रोशन दान बन्द हो जावेगे 1

(5)यह है कि पूर्व में वादीनी के प्लाट नं० १४४ (एक सौ चवालिस) का लाइसेन्स प्रतिवादी संख्या ३ (तीन) द्वारा श्रीरतन पुत्र श्री पन्ना लाल के नाम से जारी हो रखा है लेकिन वादीनी द्वारा पूर्व में प्रतिवादी संख्या ३ (तीन) को शिकायत करने पर प्रतिवादी संख्या ३ (तीन) ने कोई कार्यवादी नहीं कि तथा वर्तमान में वहॉ पास ही प्रतिवादी संख्या ४(चार) द्वारा सुलभ काम्पलेक्स बनवाया जा रहा है और एसा सुना जा रहा है कि अब यह क्षेत्र प्रतिवादी संख्या ४(चार) के अधीन आ गया है 1 इसलिये प्रतिवादी संख्या ३ (तीन) व ४ (चार) दोनो को भी पक्षकार बनाया जा रहा है क्योकि सरकारी खालसा भूमि पर हुए अतिक्रमण को प्रतिवादी संख्या ३ (तीन) व 4(चार) जिसका भी क्षेत्राधिकार हो हटाएगी 1

(6)यह है कि प्रतिवादी संख्या १ (एक) व २ (दो) द्वारा नाजायज रूप से खालसा सरकारी भूमि पर अतिक्रमण कर लिया गया है जिसे हटाने हेतू वादीनी द्वारा शिकायतें करने पर भी कोई कार्यवाही नहीं हुई तथा अब प्रतिवादी सं० १ (एक) व २ (दो) गैरकानूनी रूप से पक्का निर्माण करवानें जा रहा है 1 जिसे रूकवाने के लिये तथा गैर कानूनी अतिक्रमण को हटाने के लिए वादीनी के पास यह दावा बाबत स्थाई निषेधाज्ञा एवं आज्ञापक निषेधाज्ञा के रूप में श्रीमान के समक्ष प्रस्तुत करने के अतिरिक्त अन्य कोई विकल्प नहीं है 1

(7)यह है कि वादीगण बहक वादीनी बर खिलाफ प्रतिवादीगण दिनांक 28.4.97 (अठाइस चार सिन्तानवें) को शहर जोधपुर में उस समय पैदा हुआ जब प्रतिवादी संख्या १ (एक) व २ (दो)

किसी ठेकेदार को लाकर विवादित खालसा भूमि पर पक्का निर्माण किये जाने का निर्देश दिया तथा वादिनी के पति द्वारा मना करने पर नही माना l"

Paras no.(अ) to (ई) of the relief clause:-

(अ) कि डिक्री बाबत स्थाई निषेधाज्ञा बहक वादीनी बरखिलाफ प्रतिवादीगण संख्या १ (एक) व २ (दो) के विरूद इस आशय की सादिर फरमावें कि वे विवादित खालसा भूमि पर गैर कानूनी निर्माण नहीं करें ।

(आ) कि डिक्री बाबत आज्ञापक निषेधाज्ञा बहक वादिनी बरखिलाफ प्रतिवादी संख्या ३ (तीन) व ४ (चार) के विरूद इस आशय की सादिर फरमावें की वे प्रतिवादी संख्या १ (एक) व २ (दो) द्वारा खालसा भूमि पर जो अतिक्रमण कर जो कब्जा निर्माण कार्य किया है उसे हटावें ।

(इ) कि खर्चा मुकदमा प्रतिवादीगण से वादीनी को दिलाया जावें ।

(ई) कि अन्य कोई अनुतोष जो वादीनी के हक में हो सादिर फरमावें ।"

15. A bare reading and meaningful reading of the plaint discloses that only grievance of the plaintiff against the defendants was that the defendants have encroached upon the unoccupied (government) land and raised temporary construction over it and now they are raising permanent construction over this land. By this construction the ventilators and windows of plaintiff's house will be closed (without any

allegation of substantial diminishing of air and light or the construction will make the house or it's any part inhabitable). Even it is not pleaded since when the ventilators and doors are opening. In the plaint, the plaintiff did not sought decree against defendants' no.1 & 2-petitioners for removal of defendant's construction but sought decree against defendant's no. 3 & 4 that they be directed to remove the defendant-petitioner's construction. Reason may be that the plaintiff might have thought her easementory right might not have matured and the plaintiff herself has no right over the property which is in possession of the defendants-petitioners and according to plaintiff-non-petitioner, the property in question belongs to; U.I.T. or Municipal Corporation, Jodhpur and construction raised by the defendant-petitioner could have been removed by them alone. Though no decree for direct removal of defendant's construction was not sought by the plaintiff but the trial court still passed the decree against defendant's no.1 & 2-petitioners, directing the defendants-petitioner to remove the *Kacha*-construction from the property mentioned in Para 2 of the plaint.

16. The executing cannot examine whether the plaintiff's suit was maintainable or not, nor the executing court can see whether the original suit should have been decreed or not. The decree is final and cannot be challenged in execution proceedings. The only objection which can be examined by the executing court is whether the decree is

executable or not? If executable then how it can be executed? For this most relevant question is that what the decree is? The decree in question directed defendants to remove construction form the land mentioned in Para no.2 of the plaint. Reason for passing decree is two fold; one is that it will obstruct the air and light of plaintiff's house. The plaintiff and her husband admitted in their statements before the trial court that there is a lane in between the plaintiff's and defendant's house and their ventilators and windows are opening in the said lane. Plaintiff's husband admitted that between the house of the plaintiff and the defendant there is 20ft wide open space. Since in decree it is not mentioned that up to what distance there should be open space in front of the plaintiff's ventilators and windows the facts mentioned in judgment are looked into. Decree contains no specification of required open space for above purpose. In such situation whether executing court can pass removal of obstruction without determining the exact area necessary for getting sufficient air and light for the plaintiff-decree holder's apertures? Answer is no. The executing court can remove only "obstruction" in enjoyment of decree holder's right as decree in such case is passed for removal of "obstruction" only and to deprive judgment debtor from his entire property for achieving no purpose even of decree holder. The executing court in the facts of the case may hold enquiry also to find out the area recorded for giving relief to the decree

holder as wished by the plaintiff and decreed by the court. Even after objection of the judgment debtor, the decree holder did not disclose how much open space in front of decree holder's ventilators and windows will serve her purpose nor judgment debtor to lessen injury to him, took plea for this point. The parties failed to take plea but when the executing court was called upon to look into decree before issuing direction of removal of construction , should have applied mind how the court officer will execute the decree ? If the executing court would have applied the mind, the executing court could have applied the mind, the executing court could have looked into the fact whether there is obstruction in enjoyment of plaintiff's right is there or not. The executing court in this count could not have issued order to remove construction lying 20 ft. away from decree holder's ventilators and windows. Distance of 20 ft. between the house of the plaintiff and defendants-petitioner is an admitted fact. Construction of Sulabh Complex in this space of 20 ft. is also an admitted fact by the decree holder. Therefore, the decree for removal of any part of judgment debtor's property on this count cannot be executed because at the time of filing of execution or thereafter, no obstruction to plaintiff's right of air and light is in existence.

17. So far as decree for removal Kacha construction of the defendants is concerned, neither in the decree nor in the judgment dated

22.11.2000 there is mention of any particulars of the property with the help of which proper order for removal of the structure can be passed. There is not even description of outer boundaries of the alleged Khalsa land in the plaint. The plaintiff can get the relief which he sought in his suit. Rights determined as they were at the time of filing the suit by the plaintiff if there is no reason for moulding the relief because of change in circumstances and court if consciously passes the decree for that purpose. In the judgment, decree and even in plaint it is not mentioned that plaintiff sought relief for how much area of the land. In peculiar facts of this case the plaintiff sought relief of removal of construction from other's land, the land which according to him vests in local bodies and the local bodies already have ample power to take action against the defendants and also have power to condone and compound the wrong, if committed by the defendants. The plaintiff's suit is also not for declaration of any public right over the disputed property. Not only this but the case of the plaintiff decree holder was that the plaintiff has right to enjoy the benefit of open land which is belonging to Municipal Corporation or U.I.T., Jodhpur. The Sulabh Complex has already been constructed, not only in alleged open land by either U.I.T. or Municipal Corporation, Jodhpur but has been constructed in between plaintiff's and defendant's houses without any objection of plaintiff. Therefore, the entire land if taken to be identifiable then that land is no more an

open land available for enjoyment for the plaintiff. Therefore, in peculiar facts of this case, construction of Sulabh Complex (Public toilets) in between the two properties entirely changed the position as plaintiff's claim of enjoyment of the land open field also does not survive or at least has become doubtful. The trial court did not pass the decree against the defendants no.2 & 3 for removal of their construction as that was not the prayer of the plaintiff in the suit.

18. It appears the trial court mechanically passed the decree about immovable property simply because the defendants did not contest the suit. The plaintiff and the trial court both did not care to look into Rule 3 of Order 7 CPC which provides that where subject matter in the suit is immovable property then it must contain description of the subject-property and not only description of the property of the plaintiff which may be relevant or even necessary for proving the right of the plaintiff as was necessary in present case. Negligence of the party to suit cannot make the decree executable. This is unfortunate that the careless and negligent defendant himself may be responsible for the decree against him but still the court can act only within the jurisdiction and only in accordance with law. Non-application of mind by the trial court while deciding the suit and passing the decree resulted into lawful and binding paper decree in favour of the plaintiff but decree though binding still is not executable in the facts of this case.

19. Therefore, it is expected form all the trial courts to take care in deciding the suit relating to immovable properties and for that purpose the trial courts should not confuse itself with the subject matter and plaintiff's or defendant's properties. The subject-matter-property is not always plaintiff's property. Subject matter property in number of cases may be different than the plaintiff's property. Such is the present case. Trial courts, to avoid confusion, should avoid passing decree without specifically mentioning the complete description of the immovable property. Trial courts should also avoid decrees in terms of the Para number of the plaint. By this the trial will fail in noticing the serious defect in pleading and may pass a decree which can be challenged on the ground of decree's executability. The suit where subject matter is immovable property, description of the property in plaint as well as the decree should be in conformity with Order 7 rule 3. However, it is made clear that if the plaint, judgment and the decree if are not in conformity as above then it itself will not render the decree inexecutable as it all depends upon facts of each case. If property otherwise can be identified, the decree remains executable. The executing courts' duty is to execute the decrees and for that purpose if needed should look into judgment, and even pleadings to construe the decree and if there is any chance of removal of ambiguity the executing court should remove the ambiguity and should pass effective order to

judgment debtor or to court officer so that decree can be executed. In present case, in view of admitted facts, decree as a whole is found to be executable.

20. It appears from the impugned order of the executing court dated 25.8.2003 that even the executing court could not record a finding about the exact location and measurement of the property for which the order of demolition has been sought by the decree holders. In reply to the objection petition of the judgment debtors also, the decree holders could not explain the location of the property in dispute.

21. There is no force in the submission of the learned counsel for the plaintiff-non-petitioner that petitioners since did not contest the suit therefore, they can not dispute the identity of the property because in the facts of this case it is clear that the petitioners objection about legality of the decree can not be entertained but even if decree remains as it is because it became final because of whatever reasons but if it has been shown that the decree can not be executed. The judgment debtor has right to prove so and judgment debtors proved so, the execution petition can proceed and is liable to be dismissed. This court looking to peculiar facts as mentioned above is of the opinion that this is a fit case for exercise of supervisory power under section 115 of the CPC as the court below failed to exercise jurisdiction and committed illegality in holding that decree is executable. The executing court also committed

serious illegality in deciding the petitioner's objection petition under Section 47,C.P.C. separately even when petitioners present objection petition was pending.

22. However, before parting, it is made clear that if the local bodies; Municipal Corporation or U.I.T , Jodhpur have right under statutory power to take action against the petitioner and there are reasons for removal of the encroachment if it is so and construction of the defendants-petitioner they have there own right that will not be affected by this order. At the same time, this observation itself may not be treated to ground for taking action against the defendants-petitioner. Meaning thereby, the local bodies will be free to decide the matter according to law only, uninfluenced by the order of this court.

23. Consequently, the revision petition is allowed. The order of the trial court dated 25.8.2003 is set aside. The Petitioner's objections are allowed and decree dated 22.11.2000 passed in C.O. Suit no. 137/1998 is declared to be in-executable. No order as to cost.

(PRAKASH TATIA).J.

mlt.